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In The
Supreme Court of the United States
October Term, 1987

—o—

OKLAHOMA TAX COMMISSION,

Petitioner,

vs.

THE MUSCOGEE (CREEK) NATION, *et al.*,

Respondents.

—o—

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

—o—

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The Respondents, the Muscogee (Creek) Nation,[1] and Indian Country U.S.A., Inc.,[2] respectfully pray that the

1. The Muscogee (Creek) Nation is a federally recognized Indian Tribe. (For convenience, the Tribe will be referred to as the Creek Nation in this brief.) Extensive evidence regarding the history, customs, traditions, needs and aspirations of the Creek Nation and the Creek people was presented to the District Court during the trial of this case. Both the District Court and the Court of Appeals included summaries of Creek history in their respective opinions. See also, *Harjo vs. Kleppe*, 420 F. Supp. 1110 (D.D.C., 1976), *aff'd sub nom., Harjo vs. Andrus*, 581 F. 2d 949 (D.C. Cir., 1978), which contains an extended discussion of the history of the Creek Nation.

2. Indian Country U.S.A., Inc., is the general partner in Indian Country U.S.A.-Limited Partnership No. 1. The corporation

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Petitioner's request for a *writ of certiorari* will be denied. In support of their request that the Writ be denied, the Respondents would inform the Court of the following circumstances and authorities:

PROPOSITION I: THE OPINION OF THE COURT OF APPEALS IS A WELL CONSIDERED AND RESPONSIBLE APPLICATION OF SETTLED LAW, AND IT SHOULD NOT BE REVIEWED ON CERTIORARI.

Review by *Writ of Certiorari* in the Supreme Court of the United States is not a matter of right. Rule 17 of the Rules for the Supreme Court of the United States sets out the criteria to be used in determining whether review by the Supreme Court is necessary or proper in a given case. Generally speaking, the rule recognizes that the Supreme Court is an institution with tremendous demands on its time, and that it should only be called upon to review decisions of the Courts of Appeals which concern areas of unsettled law or which have departed from established precedent. The record in this case makes it clear that this is hardly a case meriting further review, or one which might likely result in a reversal.

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("ICUSA") has contracted with the Creek Nation to provide management services and, through its associated limited partnership, venture capital for the creation and operation of the Tribal Enterprise, Creek Nation Bingo, ICUSA joined with the Creek Nation in the original District Court action for declaratory and injunctive relief in the summer of 1985. The District Court ruled that ICUSA lacked standing in its own right. This portion of the trial court's decision was reversed by the Tenth Circuit Court of Appeals which recognized the right of ICUSA to participate as a party in this litigation. The Petitioner has not challenged that ruling in its Petition for a Writ of Certiorari.

A. THE DISTRICT COURT'S FINDINGS OF FACT ARE AMPLY SUPPORTED BY THE RECORD.

The facts in this case were proven in a hotly contested trial, and the factual findings of the District Court,[3] as adopted by the Court of Appeals, should not be disturbed unless clearly erroneous and completely unsupported by the record. There is simply no reason to believe that the District Court acted improperly or imprudently in promulgating its factual findings. To the contrary, the record in this case establishes that the District Court gave careful consideration to all of the evidence presented. The District Court's findings are presented in a clear, cogent and logically compelling fashion, and this Court need not devote its scarce time to resifting the factual record.[4]

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3. Virtually every aspect of the factual and historical record was at issue in the trial, including without limitation: 1) the history of the Creek Nation; 2) the history of the relationship between the Creek Nation and the federal government; 3) the nature of federal policy toward the Creek Nation; 4) the history of the State of Oklahoma; 5) the history of the land on which the Tribal Enterprise was situated; 6) the nature and history of the Tribal Enterprise itself; and, 7) the respective (and arguably competing) sovereign needs and interests of the Creek Nation and the State of Oklahoma.

4. Rather than argue that the District Court's Findings of Fact are unsupported by the record (something of an impossible task), the State of Oklahoma simply ignores the District Court's Findings and flatly states "facts" to the contrary. See the final partial paragraph on page 7 of the Petitioner's Brief, in which the Petitioner badly asserts:

> . . . Under [the Curtis Act and the General Allotment Act of 1901] *the Mackey Site, now owned by the Tribe, was allotted to Louisa Mackey* along with other land beside the Arkansas River in Tulsa County, Oklahoma. . . . [*emphasis* added]

(Continued on following page)

The standard for review of such findings on appeal is that the District Court's findings of fact will not be disturbed unless they can be said to be clearly erroneous. The case below was decided after the conclusion of a lengthy trial in which all parties were afforded an opportunity to bring forth evidence in support of their respective positions. The District Court then properly based its decision on the record which had been made before it. Just as it would have been improper for the District Court to have speculated on evidence which might have been presented, so too it would have been improper for the Court of Appeals to have strayed outside of the evidence admitted below.[5] *AMOCO Production Company vs. Western Slope Gas Company*, 754 F.2d 303 (10th Cir., 1985).

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This is a complete misstatement of the record. Quite to the contrary, the facts established and *the District Court and Court of Appeals found that the Mackey Site had never been allotted to anyone, and that the Creek Nation could trace an unbroken and continuous title directly back to the Land Patent it had received from President Millard Filmore in 1832.* (See discussion regarding the Indian Country status of the Mackey Site at page 6, *infra*.)

5. The inquiry would not be whether the District Court reached the correct decision, but only whether it reached a conclusion that was permissible in light of the evidence. *An-son Corporation vs. Holland-America Insurance Company*, 767 F.2d 700 (10th Cir., 1985). Because Indian history and Indian law are intertwined as in no other area of law (with history being the dominant element), it is particularly important that the reviewing Court give substantial deference to the findings of the trial Court.

B. THE DISTRICT COURT AND COURT OF APPEALS WERE REQUIRED TO CONSTRUE ALL TREATIES, STATUTES AND OTHER LAWS IN FAVOR OF THE CREEK NATION.

The Supreme Court of the United States has repeatedly advised the District Courts and Courts of Appeals that all matters open to interpretation in matters affecting the rights of Indian Tribes are to be construed liberally in favor of the Indians. In *Montana, et al. vs. Blackfeet Tribe of Indians*, 471 U.S. 759, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985), this Court restated the principle:

> . . . The State fails to appreciate, however, that the standard principles of statutory construction do not have their usual force in cases involving Indian law. As we said earlier this Term, '[t]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians.' [citation omitted] Two such canons are directly applicable in this case: first, the States may tax Indians only when Congress has manifested clearly its consent to such taxation, [citation omitted]; second, statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit[.] [citation omitted]

Treaties are particularly in need of protective interpretation. In *Choctaw Nation vs. United States*, 318 U.S. 423, 431-32, 63 S.Ct. 672, 87 L.Ed. 877 (1943), this Court stated:

> . . . Treaties were imposed upon them [Indians] and they had no choice but to consent. As a consequence, this Court has often held that Treaties with the Indians must be interpreted as they would have understood them . . . and any doubtful expressions in them should be resolved in the Indians favor.

Both the District Court and the Court of Appeals were required to follow these standards in interpreting the law to be applied to this case, particularly in view of this Court's recent decision in *California, et al., vs. Cabazon Band of Mission Indians, et al.*, — U.S. —, 107 S.Ct. 1083, — L.Ed.2d — (1987). Applying these clearly defined standards to the carefully considered opinions of the District Court and the Court of Appeals, it is unlikely that the Supreme Court would conclude that the Court of Appeals acted in any other than a proper and responsible fashion when it upheld the Findings of Fact and Conclusions of Law of the District Court.

C. THE OPINIONS OF THE DISTRICT COURT AND THE TENTH CIRCUIT COURT OF APPEALS ARE WELL CONSIDERED AND RESPONSIBLE APPLICATIONS OF SETTLED LAW.

The Petitioner has raised only two issues for possible consideration by this Court, and neither issue involves an area of unsettled or novel law. The Petitioner's first claim is that the Court of Appeals (and before it the District Court) made a mistake in applying the balancing of interests test required by *Washington vs. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980). The Petitioner's second claim is that the Court of Appeals (and before it the District Court) mistakenly determined that the Mackey Site is Indian Country within the meaning of 18 U.S.C. § 1151.

Each of these "Questions Presented" concerns the application of well settled law to the facts of this particular case. As such, neither question presents a proper issue

under Supreme Court Rule 17, and neither should be the basis for granting a *writ of certiorari*. Moreover, as is demonstrated in the remaining sections of this brief, the opinions of the District Court and the Court of Appeals establish that each Court gave careful consideration to the relevant law and properly applied the relevant law to the facts proven at trial. As such, the actions of the District Court and the Court of Appeals were entirely proper and need not be subjected to further review.

PROPOSITION II. BOTH THE DISTRICT COURT AND THE COURT OF APPEALS PROPERLY BALANCED THE COMPETING INTERESTS OF THE STATE OF OKLAHOMA AND THE CREEK NATION WITH REGARD TO THE REGULATION AND TAXATION OF THE TRIBAL ENTERPRISE CREEK NATION BINGO.

The Petitioner complains that the District Court and the Court of Appeals failed to rule in its favor after balancing the competing interests of the State of Oklahoma and the Creek Nation with regard to the regulation and taxation of the Tribal Enterprise known as Creek Nation Bingo. While these Courts certainly did rule against the State, it is clear from their respective opinions that each was well aware of the controlling legal principles and that each was careful to give due consideration to the competing sovereigns.[6]

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6. Indeed, if anything, the Courts below were too willing to grant to the State the right to speculate about its claimed

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The District Court resolved the balancing issues in these words:

> The Creek Nation's interest in being free from state regulation and taxation is also strong. The tribal bingo enterprise generates valuable revenues used by the Creek Nation for an array of legitimate and pressing concerns. Revenues thus raised are used to enable the Creek Nation to be self-sufficient in its internal affairs and to address the needs of the tribe, including employment, health care, nutrition, housing and education. Ordinance No. NCA-84-04, Section 101. Moreover, Creek Nation Bingo has created jobs. A number of those jobs are held by members of the Creek tribe; many of those members were unemployed prior to working for the tribal bingo enterprise. Even apart from the revenues flowing to the Creek Nation from the bingo enterprise, the payment of wages by the enterprise to those members is of tremendous benefit to the Creek Nation. The State's attempt to regulate the bingo enterprise and impose its sales tax Code on that enterprise would substantially reduce the revenues and economic benefits currently realized by the Creek Nation and impede its ability to carry out its legitimate and paramount concerns of self-sufficiency and economic development. The scale is further tipped in favor of the Creek's interest in being free from the state taxing and regulatory scheme, because the thing of value being marketed here is created, sold and consumed on tribal land through tribal activities. This situation is quite different from the taxable activity in *Washington* [*vs. Confederated Tribes of the Col-*

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interests, even though the Petitioners failed to introduce any evidence of any such interests at trial. At the very least, such evidence should be required to be produced in Court if it is to be held out as the justification for the wholesale invasion of tribal sovereignty.

> *ville Indian Reservation*]. There the state's taxing interest outweighed the tribe's interest because the taxable product was imported onto the reservation for resale and consumed off the reservation. 447 U.S. at 156-57, 100 S.Ct. at 2083. Here the Creek Nation's interest in generating revenues for essential governmental programs is stronger than the State's interest because the revenues are derived from value generated on Creek lands by activities involving the tribe. [citation omitted]
>
> This Court finds that the interests of the tribe in its sovereignty, self-government and control over its own lands and activities outweigh the interest of the state enumerated here. Those state interests are further outweighed by the interests of the tribe and federal government in the economic self-sufficiency of the tribe and the vital purposes to which the revenues will be put. [footnote omitted]
>
> [From the opinion of the District Court, beginning at page A-53 of the Appendix to the Petitioner's Brief.]

The Court of Appeals approved of the actions of the District Court and then repeated the same balancing process in a step by step process closely following *Cabazon:*

> . . . Thus, when a state "asserts authority over the conduct of non-Indians engaging in activity on the reservation," [*White Mountain Apache Tribe vs. Bracker,* 448 U.S. 136, 143, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980)], at 144, the Court has instructed us to engage in "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Id.* at 145. Such an inquiry focuses on an examination of "the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions

> of tribal independence." *Id.* at 144-45. "State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." [*New Mexico vs. Mescalaro Apache Tribe*, 462 U.S. 324, at 334, 103 S. Ct. 2378, 2386, 76 L.Ed.2d 611 (1983).] For the reasons that follow, we conclude that the state's interest in taxing Creek bingo and related activities is minimal, and is incompatible[7] with and outweighed by federal and tribal interests.
>
> [From the opinion of the Court of Appeals, beginning at page A-29 of the Appendix to the Petitioner's Brief.]

There can be no doubt that the principles of *Colville* were not only recognized but were scrupulously applied by both the District Court and the Court of Appeals. That the outcome was in favor of the Creek Nation is simply a reflection of the facts of this case.

PROPOSITION III: THE MACKEY SITE IS INDIAN COUNTRY IN ITS PUREST FORM.

The Mackey Site,[8] on which the Creek Nation operates its Tribal Bingo Enterprise, is a portion of the original

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7. This word is mistakenly reproduced as "compatible" in the Appendix to the Petitioner's Brief, however, the word used by the Court of Appeals is certainly "incompatible" with this typographical error.

8. The land in question is properly described as:

> Beginning at the NW corner of Lot 1 of Section 18, Township 18 North, Range 13 East, thence in a general southeasterly direction with the so-called meander line forming the West boundary of Lots 1, 5 and 6 to its intersection with the section line between Sections

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land which was acquired by the Tribe as partial compensation for the loss of Tribal property east of the Mississippi River, and for the forced removal of the Creek Nation to the area now known as the State of Oklahoma.[9] As such, it has been a part of the Creek reservation for more than 150 continuous years.[10]

The District Court concluded its discussion of the Mackey Site issues in this way:[11]

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17 and 18; thence West to the thread of the stream of the Arkansas River; thence up said river with the thread of the stream to a point where it intersects the section line between Sections 18 and 7; thence East to point of beginning, containing 100 acres, more or less, Tulsa County, Oklahoma.

9. This shameful episode in American history is remembered as The Trail of Tears.

10. At trial the State argued that the Mackey site had lost its "Indian Country" character by virtue of its allegedly having been allotted to Louisa Mackey, a freedman, shortly after the turn of the century. In actual fact the land merely *adjoined* land allotted to Louisa Mackey, and the Creek Nations title vis a vis Ms. Mackey had been cleared in a quiet title action ending in 1925. *United States vs. Mackey*, Final Decree of the Court, dated the seventh day of March, 1925. Because the State of Oklahoma was a party Intervenor in the *Mackey* case, the State is bound by the doctrine of *res judicata*, and it is estopped from asserting any claim adverse to the decision in that case.

11. See the testimony of Dean Rennard Strickland, Editor in Chief of Felix S. Cohen, *Handbook of Federal Indian Law* (1982 ed) and a leading historian of the Five Civilized Tribes at page 113, beginning at line 18:

Q: Dean Strickland, under circumstances such as this where we have a chain of title recognized in the

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The Mackey site was a part of the original Creek estate derived by treaty and patent from the United States government. It remained a part of that estate after the Treaty of 1866. The Mackey site was not part of the Creek lands allotted to the tribe's members by the terms of the Five Tribes Act, 34 Stat. 137. The Court recognizes that the Five Tribes Act contemplated the dissolution of the Creek Nation and specifically provided that lands held by the tribe at the time of dissolution would be held in trust by the United States government. Section 27, 34 Stat. 137, 148. Yet the federal government has treated the Mackey site as trust property even though the tribe

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Mackey case, recognized by the Bureau's memorandum [and] dating back to the 1830's, do you have any trouble with the notion considering this land to be Indian Country?

A: I think it quite clearly is. It's the purest form. It has a title derived from a patent under an Indian treaty.

Mr. John Fritz, Acting Assistant Secretary of the Department of the Interior and head of the Bureau of Indian Affairs, testified before the District Court that the federal government officially recognizes the Indian Country status of the Mackey Site. For instance, at page 15 of the transcript of his testimony, Mr. Fritz states:

Q: (By Ms. Karshmer) Are you familiar with the term—we used it so I assume you are—Indian Country?

A: Yes, I am.

Q: Does the Department of the Interior consider the tribal lands held in trust for the Muscogee (Creek) Nation as being Indian Country?

A: I do. So I guess I am speaking on behalf of the Department. I view it as Indian Country based upon my knowledge and experience.

Q: And you are answering as the Acting Assistant Secretary of the Interior?

A: Yes, I am.

> was never dissolved as contemplated by the Act. The Mackey site is the purest form of Indian Country; it is land set apart for the use and benefit of the Creek Nation. This trust land is Indian Country under § 1151(a).
>
> [From the opinion of the District Court, beginning at page A-41 of the Appendix to the Petitioner's Brief.]

It is truly remarkable that the State continues to claim that the Mackey Site was allotted to a Creek Freedman at the beginning of this Century. *This is a frivolous allegation because the State lost this very same argument to the very same Creek Nation in 1925,* when the United States District Court for the Eastern District of Oklahoma promulgated its final decree in *United States vs. Mackey,* Final Decree of the Court, dated the seventh day of March, 1925. (See the Appendix to the Petitioner's Brief, beginning at page A-58) Because the State of Oklahoma was a party Intervenor in the *Mackey* case, the State was bound by the doctrine of *res judicata,* and was estopped from asserting any claim adverse to the decision in that case. The title to the Mackey Site was quieted in the Creek Nation *vis a vis* the state of Oklahoma over sixty years ago, and it cannot be undone at this late date.

Nor can the Petitioner successfully argue that this land cannot be considered to be § 1151 Indian Country because the Creek Nation doesn't live on a "reservation," because: 1) the lands were in fact historically considered to be the Creek "reservation" even though the Creek Nation has traditionally held fee title to its properties; and, 2) the federal Courts have consistently held that, for purposes of understanding whether a particular tract of land is "Indian Country" under 18 U.S.C. § 1151, it makes little or

no difference what label the Congress has used to describe the property set aside for the use and benefit of the Indian Nations.

Youngbear vs. Brewer, 415 F. Supp. 807, 809 (N.D. Iowa, 1976), *aff'd* 549 F. 2d 74 (8th Cir., 1977) provides:

> The determination of whether lands are considered "Indian Country" does not turn on the label used in designating them, *United States vs. McGowan,* 302 U.S. 535, 58 S. Ct. 296, 83 L. Ed. 410 (1938), nor on the manner in which the lands in question were acquired. [citation omitted] Rather the test is whether such lands have been set apart for the use, occupancy and protection of dependent Indian peoples.

Thus, the Mackey Site must be considered Indian Country, even though the lands of the Five Civilized Tribes were not always called, "reservations."[12] Moreover, the evidence presented below established that the Mackey Site is now held in Trust by the United States. Such Trust lands are § 1151 Indian Country, and they remain Indian Country even in those cases in which a reservation has been disestablished. *Cheyenne-Arapahoe Tribes of Oklahoma vs. the State of Oklahoma, et al.,* 618 F.2d 665 (10th Cir. 1980). Furthermore, in *United States vs. Chavez,* 290 U.S. 357, 54 S.Ct. 217, 78 L.Ed. 360 (1933), the United States Supreme Court held that "Indian Country" includes "any unceded lands owned or occupied by an Indian Nation.[13]

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12. Significantly, in the *Mackey* case in which both the State of Oklahoma and the Creek Nation were parties, the Mackey Site is specifically described as a part of the Creek "reservation." Also the Trial Court notes that Article 9 of the Treaty of 1866 specifically refers to the diminished Creek lands, as the, "reduced Creek reservation."

13. See also *United States vs. Sandoval,* 231 U.S. 28, 34 S.Ct. 1, 58 L.Ed. 107, 111 (1913).

No Act of Congress has ever terminated or disestablished the Creek reservation; neither on its face, nor by clear surrounding circumstances or legislative history. Such unallotted Tribal lands which have been set aside for the use of the Creek Nation for more than 150 years are indeed Indian Country in its purest form.[14]

—o—

CONCLUSION

For the reasons stated, the Respondents pray that the Court deny the Petitioner's request for a *writ of certiorari.*

Respectfully submitted as of February 3, 1988.

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14. It is of absolutely no consequence that the State then attempts to rely upon the holding in *United States vs. Hayes,* 20 F.2d 873 (8th Cir., 1927) for a contrary opinion. In the first instance, the *Hayes* decision came two years after *Mackey* was decided, and the later decision cannot alter the effect of the *Mackey* decision on the Mackey site itself. Secondly, the *Hayes* decision declares the rights of riparian owners to river beds and streams, while the essence of the *Mackey* decision is that the Mackey site is not, and never was, riparian to Louisa Mackey's actual allotment land.